No. 12260

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THOMAS KELLY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE LLOYD L. BLACK, *Judge*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

JURISDICTION

In the present case appellant Tom Kelly was regularly indicted, represented by counsel, tried and convicted of murder in the first degree and sentenced to life imprisonment upon the jury's verdict which recommended against capital punishment. A copy of the indictment is found on Page 2 of the appellant's

brief. Jurisdiction is based upon Title 18, U.S.C., Section 1111.

As alleged in the indictment, the offense was committed on the Quillayute Indian Reservation which is land belonging to the United States of America and as such is within the territorial jurisdiction of the United States. The Quillayute Indian Reservation lies within Jefferson and Clallam Counties in the Northern Division of the Western District of Washington.

STATEMENT OF THE CASE

The appellant, Tom Kelly, is an Indian. The victim's name was Horace Bright who was likewise an Indian and the natural father of the appellant Tom Kelly. Ivy George is the mother of the appellant Tom Kelly and the common-law wife of the deceased Horace Bright. She is likewise an Indian.

On the night of October 25, 1948, the appellant Tom Kelly, his father Horace Bright, and his mother Ivy George, were temporarily residing in a two room dwelling owned by one Coe at La Push, Washington, on the Quillayute Indian Reservation. Tom Kelly and Horace Bright had been engaged in commercial fishing for the past few days. On the evening of October 25, 1948, Tom, Horace and Ivy, together with two other Indians, drove to Forks, Washington, some 12

to 15 miles away and procured two cases of beer, a gallon of wine and some whiskey. While driving back to La Push some of the liquor was consumed. Tom, Horace and Ivy arrived at the Coe residence at approximately midnight.

Thereafter, Tom Kelly resumed work on a dip net which he was making for another fisherman. Horace objected to Tom making dip nets for other fishermen and there was an argument between the two. Some time after that argument had subsided Horace Bright became embroiled in an argument with Ivy George and started beating Ivy George about her head with his fists. Tom Kelly paid no attention to this action. Apparently Tom had his back turned to his father and mother during this time. Immediately thereafter Tom Kelly looked up and saw Horace with a knife in his hand. Tom does not now know whether or not Horace was holding the knife in any menacing manner (Tr. 245, 246, 247, 248). Tom grabbed the hunting knife and attacked Horace Bright stabbing him eight times. When Tom first stabbed Horace, Horace dropped his knife and grabbed Tom to keep from falling (Tr. 248, 249). Horace Bright did not make any attempt to stab Tom and Tom was not cut or wounded in any way. The wounds inflicted by Tom were; one in the right buttocks, one on the left side

approximately half-way between the waist and armpit puncturing the lung, one in the back of the neck, one through the upper right arm, one just under the right armpit puncturing the lung and three in the right breast near the shoulder (See reproductions of exhibits 3, 4, 14 and 15 in appendix hereto).

At a result of these wounds Horace Bright died almost immediately. Tom Kelly and Ivy George dragged the body to the bed. Ivy George covered the body and then, at Tom's request, left the Coe residence to hitchhike to Yakima. Before leaving, Ivy George poured out a quart of the wine and took it with her. The appellant Tom Kelly drank two or three more bottles of beer and laid down on the floor near the stove and slept the night through with his clothes still covered with the blood of Horace Bright (Tr. 253).

The next morning Tom Kelly took the remains of the beer and wine to a neighbor's house and tried to sell it. Tom then proceeded towards Seattle, running out of money at Port Angeles where he sold his watch and the murder weapon, his hunting knife, for $1.00. In Seattle Tom stayed overnight at the Travelers Hotel and the following morning gave himself up to the Sheriff of King County. Prior to the second day

after the murder, Tom still failed to notify anyone of the death of Horace Bright.

SPECIFICATIONS OF ERROR

Under the section entitled "Specifications of Error" as set out in the appellant's brief there are five assignments of error. In that section of the appellant's brief entitled "Argument" there are three assignments of error. The errors assigned under the section "Specifications of Error" are not the same as those discussed under the section "Argument." Therefore, in the appellee's brief only those assignments of error which are listed under the section "Argument" in the appellant's brief will be considered.

ARGUMENT

I

The first specification of error as set out in Section I of appellant's brief reads as follows:

> "The trial Court, in permitting the prosecution to introduce on cross-examination of Virginia Kelly, the wife of the appellant, evidence that appellant had beaten her, committed plain error because:
>
> 1. Evidence of an independent crime not related to the charge being tried is inadmissible;
> 2. The prosecution is not allowed to introduce into evidence testimony concerning the character of the appellant prior to the latter having put his character in issue;

3. Evidence of individual acts of misconduct on the part of the appellant not related in any manner to the crime with which he is charged is inadmissible."

The appellant's attempts to bring his Specification of Error No. 1 within the exception to the general rule that errors committed at the trial and not called to the trial Court's attention are not subject to review. To prove the exception he cites:

United States v. Atkinson, 297 U.S. 157;

Suhay v. United States, 95 F. (2d) 890 (10 Cir.);

Arwood v. United States, 134 F. (2d) 1007 (6 Cir.);

Moore v. United States, 161 F. (2d) 932 (5 Cir.);

The Courts in the cited cases all recognized that in exceptional cases where justice requires they may reverse, notwithstanding no objection was made, and no exception taken. While recognizing this ruling, in none of the cases cited did the Appellate Court reverse.

In *Moore v. United States* the Court said on Page 933:

"When a defendant is convicted, as appellant here was, on a fair charge and on a trial containing no objections or exceptions to its course and conduct, only the strongest kind of showing that justice has miscarried will avail him. The record is brief, the testimoy in what was said and done and in its implications is clear, simple and direct, and it certainly cannot be said that

it was a manifest miscarriage of justice to convict upon its showing. No reversible error appearing, the judgment is affirmed".

Also in *Arwood v. United States* the Appellate Court, while recognizing the exception to the rule, refused to reverse on claimed error of introduction of other crimes since they were explanatory of the appellant's defense. Appellant appealed from a conviction of first degree murder and complained, as in the instant case, of error due to the fact that on cross examination of a defense witness, testimony of a prior felony attributed to appellant was elicited. The Circuit Court held that this was not reversible error in the light of appellant's defense which was that he was of low and irresponsible mentality. The Suhay case and the Moore case referred to later had similar holdings.

The theory of appellant Kelly was self-defense and defense of his mother. Many witnesses testified to the character of the deceased to establish his reputation for violence and turbulence. This could have only one purpose, that is to establish that the appellant knew of the deceased's reputation for violence, and that this knowledge created in him a "state of mind" in which he personally feared the deceased, or in which he feared for his mother's safety. The cross

examination complained of by appellant was proper rebuttal of the direct examination of Virginia Kelly. The pertinent part of the direct examination and the remarks of the Court to objection of Government counsel omitted from the appellant's brief and the pertinent cross examination is as follows: Tr. Pg. 166

DIRECT

"Q. Mrs. Kelly, you say Tom knew of the general reputation of Mr. Bright for violence of peacefullness?

A. Yes, he did.

Q. And what was his understanding of that reputation, as to whether it was good or bad?

A. It was bad.

Q. I did not hear you.

A. You mean Horace's reputation?

Q. Yes, Horace Bright's reputation.

A. Horace's was bad.

Q. Tom's understanding of his reputation was, then, that he was a violent man?

A. Yes, that he was a violent man.

* * * *

Tr. pg. 168

Q. Now, Virginia, do you remember of any occasions on which Horace Bright exercised violence toward Mrs. Bright in the presence of Tom?

A. Yes, he has. Yes, I saw him, and Tom saw

him several times beat up on his mother.

Q. Can you tell us of any of those occasions?

A. One time we were staying in Lapush.

* * * *

Tr. pg. 169 to 171

Q. What did he do?

A. Oh, he beat her up and gave her a black eye, and knocked her down on the bed and slapped her and everything.

Q. Was Tom present at that time?

A. Yes. We were in the kitchen, and he saw it.

Q. Now, Virginia, do you know of any other times that the deceased, Horace Bright, ever made any violent threats toward Mrs. Bright in the presence of Tom or within his hearing?

A. Well, he did at one time when we were all staying together at Lapush.

Q. *Were those threats made in the presence of* Tom?

A. *Yes, but Tom never thought anything of them.*

MR. EVANS: I did not understand.

Q. You say Tom didn't think anything of them?

A. Yes.

Q. Why not? Do you know?

A. No, I do not.

Q. When were those threats made, do you remember?

A. That was in 1945, too.

Q. That was in 1945, also?

A. Yes.

Q. Do you remember what the threats were? The words?

A. The words?

Q. Yes, the words or the meaning.

MR. EVANS: I am going to object to this because she said Tom did not think anything of it.

MR. JOHNSON: Your Honor, I submit that while he might not have thought anything of it at the time, continued actions of the decedent would confirm it.

THE COURT: I will allow the question to be answered. The jury understands the fact that the Court allows certain testimony to be introduced does not mean that the Court does or does not believe the testimony is true. It will be for the jury to determine after they have heard all the evidence and had opportunity to compare all the evidence, written evidence and oral evidence.

It will be for them to determine, first, whether the testimony is true or not, and, second, whether the Defendant believed it or not. The witness may testify, and after it is heard by the jury it will be for the jury to determine how much or little weight to give to it.

Q. Do you remember what the threats were, the words?

A. He just said he was going to kill Mrs. Bright. When he was mad, — I don't know what he was angry about, but he was taking

it out on Mrs. Bright, and he said he was going to kill her for it.

Q. Do you know of any other occasion at any time the deceased ever threatened in the presence of Tom or within his hearing to kill Mrs. Bright.

A. The time we were staying at Ross Campbell's berry patch.

* * * *

CROSS EXAMINATION

Tr. pg. 172

By MR. EVANS:

Q. Now, Mrs. Kelly, on how many occasions has Tom seen Horace Bright use violence toward his mother, Ivy, to your knowledge?

A. Oh, quite a few times.

Q. Do you know how many?

A. I wouldn't know exactly.

Q. It was a common occurrence, wasn't it?

A. Why yes, it was.

Q. Now, the time in 1945 when Horace made some remarks, as you say, that he was going to kill Ivy, did Tom do anything about it then?

A. Yes, he stopped his father from beating her up.

Q. What did he do?

A. He told his father to leave his mother alone, that he loved his mother, and he did not want her to be hurt.

Q. Did he try to force him to stop?

A. No, he told his father to leave his mother alone, and Horace stopped fighting his mother and said, "All right, son."

* * * *

Tr. pg. 174

Q. As a matter of fact, there have been times when Tom has beat you, hasn't there?

A. Yes, we just had family quarrels.

Q. The answer is yes?

A. (No response.)

Q. As a matter of fact, a great many Indian men beat their wives, don't they?

A. I guess they do.

Q. There is nothing unusual about it, is there?

A. No, there isn't.

Counsel says "No objection was taken to the introduction of this evidence, and no exception was taken to its admission." He fails to mention however, that on the day after the evidence was introduced, the Court said (Tr. page 211, line 25, to page 212, line 3):

"Mr. Johnson, is it your position that I have made any mistake in ruling in this trial other than the denial of your motion for dismissal at the end of the Government's case?

MR. JOHNSON: No, it is not. That is the only exception I have taken to the Government's ruling.

THE COURT: If there were any error you felt

I have made in ruling on the admission of evidence, I would listen to you now, and in the event you convinced me I had been in error, I would give you an opportunity to put in what you think I should.

MR. JOHNSON: No, I have no objection in that regard." (Tr. 212)

After testimony as to the knowledge of the appellant of the violent reputation and utterances of the deceased, in order to show the appellant's state of mind, it is proper to cross examine concerning the actual effect of the knowledge on this state of mind. "The state of a man's mind is as much a fact as the state of his digestion," *Edgington v. Fitzmaurice*, L. R. 29, Ch. D. 459, and when evidence as to the state of mind is introduced, it is a proper subject of cross examination. The answer of Virginia Kelly that the accused thought nothing of the deceased's threats, though made in his presence, makes proper cross examination explaining such a mental condition.

Wharton's Criminal Evidence, Vol. 1, 11th Edition, Sec. 339, page 480, gives a concise definition of the evidence admissible to prove self-defense:

> "Proof of the dangerous character of the deceased, known to the defendant, and *affording him reasonable grounds for belief that he was in imminent danger of death or great bodily harm* at the hands of the deceased to be averted only by the taking of life, is relevant."

The rule that testimony concerning another crime is inadmissible has many exceptions. To quote again from Wharton's Criminal Evidence, Sec. 345, pages 488-489:

> "Any difficulty as to the admission of evidence which shows, or tends to show, the commission of another crime disappears if the evidence is considered strictly upon the grounds of its relevancy to the issues on trial, provided the evidence of other acts is not used to prove the corpus delicti. If evidence is competent, material, and relevant to the issues on trial, it is not rendered inadmissible merely because it may show that the defendant is guilty of another crime. Such evidence is not admitted because it is proof of the other crime, but because of its relevancy to the charge on trial."

One of the exceptions to the general rule of admissibility of other acts of misconduct is evidence rebutting a special defense, in this case, self-defense. To sustain a plea of self-defense the accused must show that he actually apprehended danger and that he acted upon such apprehension. The word "apprehend" as used in this connection is not synonymous with fear, but with *belief*. Wharton's Criminal Evidence, Sec. 327, Page 450.

The appellant quotes at length from the case *United States v. Modern Reed and Rattan Company*, 159 F. (2d) 656, in support of the general rule that evidence of other crimes than the one in the indict-

ment are inadmissible. In that case the evidence of the prior crime was made the basis of the Government's case and was alleged as such in the opening statement of the Government's counsel. In the Modern Reed case, supra, it was apparently thought by all concerned that proof of prior conviction was necessary to establish the charge in the indictment. The case is no precedent for the present complaint of appellant.

In *Johnston v. United States*, (C.C.A. 9) 22 F. (2d) 1, the Circuit Court said at page 5:

> "The general rule is unquestioned that, when a defendant is put on trial for one offense, evidence of a distinct offense unconnected with that laid in the indictment is not admissible. * * *
> It is difficult to determine which is the more extensive, the doctrine or the acknowledged exceptions. * * *
>
> Evidence which is relevant is not rendered inadmissible because it proves or tends to prove another and distinct offense. *Astwood v. U. S.* (C. C.A.) 1 F. (2d) 639; *McCormick v. U. S.* (C.C.A.) 9 F. (2d) 237; *Tucker v. U. S.* (C.C.A.) 224 F. 833; *Lueders v. U. S.* (C.C.A.) 210 F. 419. * * *"

Also in *Moore v. United States*, 150 U.S. 57, 37 L. ed. 996, the Court held that evidence is admissible in a criminal action which tends to show motive, although it tends to prove commission of another offense by the defendant. Also in *Means v. United States*, 65 F.

(2d) 206, the Appellate Court refused to reverse a criminal conviction on the ground that the evidence showed prior convictions of the defendant even though he did not take the stand or put in any defense. The Circuit Court in this case quoted from the Moore case.

In the case of *Suhay v. United States*, 95 F. (2d) 890, cited by appellant, the defendant had been convicted of first degree murder. The Court admitted evidence of prior crimes and one of the grounds for appeal was that admission of this evidence was prejudicial. The Court, on page 894, quoted the general rule of admissibility of other crimes and then went on to say:

> "But relevant evidence which tends to prove a material fact should not be excluded merely because it shows or tends to show that the accused committed another offense at a different time and place. The test in measuring the admissibility of evidence is whether it is material to any issue in the case on trial. If so, it should not be rejected even though it establishes the commission of another crime. The evidence relating to the offenses committed in New York was material upon the question of motive for the homicide."

The other cases in support of this principle are too numerous to quote.

Since the entire plea of self-defense or defense of his mother rests on the knowledge of appellant of

the violent and turbulent character of the deceased and his belief therein, and his apprehension of danger due to such character, evidence on cross examination rebutting or explaining direct testimony of his belief or lack thereof is relevant and proper. The fact that such cross examination elicits misconduct is within the exception to the general rule, and is not error.

II.

Under section II of the Argument as set out in appellant's brief, four errors are claimed. As set out in the preamble to Section II of the Argument these four claimed errors are as follows:

1. The Government failed to prove deliberation and premeditation beyond a reasonable doubt.

2. The trial Court made reversible error in failing to grant appellant's motion for directed verdict on the first degree homicide charge.

3. The trial Court further erred in submitting the issue of first degree murder to the jury.

4. The trial Court erred in not granting appellant a new trial on grounds Nos. III and IV of its motion alleging that verdict was contrary to the weight of the evidence and was not supported by substantial evidence.

As to the first error claimed above by appellant it is conceded in appellant's brief that the evidence must be considered in the most favorable light for the Government in determining whether or not there was sufficient evidence on the question of deliberation and premeditation upon which the jury could find beyond a reasonable doubt that such elements of the crime were present.

At the close of the Government's case, the evidence thus far adduced, which if believed, proved the following facts:

1. Tom Kelly stabbed Horace Bright to death. (See copies of Tom Kelly's signed statements, Exhibits 1 and 2, attached hereto in the Appendix.)

2. Tom Kelly fled from the scene of the crime.

3. Tom Kelly inflicted eight stab wounds on the body of Horace Bright. These stab wounds were in such places on the body of Horace Bright that it would have been physically impossible for Tom Kelly to have inflicted them all unless at least part of the time he was attacking Horace Bright from the rear. (See reproduction of Exhibits 3, 4, 14 and 15 attached hereto in the Appendix.)

4. Horace Bright was a strong man, being ap-

proximately 6 feet tall and weighing approximately 185 pounds.

5. The wounds on Horace Bright's body are not the slashings which would be the result of a wild, frenzied attack, but are just large enough to allow the knife blade to enter the body, indicating a cool, deliberate, premeditated attack by Tom Kelly.

At the close of all of the evidence, the following additional facts had been established:

1. Tom Kelly is right-handed and was holding the hunting knife in his right hand while he was stabbing Horace Bright (Tr. 240 and 249). From these facts it is clear that the wounds in the upper right arm, right breast and under the right armpit were inflicted while Tom Kelly was attacking Horace Bright from the rear. It is physically impossible for these wounds to be inflicted by a shorter man attacking a taller man from any position except from the rear.

2. Tom Kelly confessed to first degree murder when he testified that after Horace Bright dropped his knife he kept right on stabbing until Horace Bright dropped.

"Q. What happened after you stabbed him?

A. He dropped his knife and hung on to me,

and I kept cutting him up.

Q. How was that?

A. When I first cut him, he grabbed hold of me, and I kept on cutting him.

Q. He dropped his knife?

A. Yes.

Q. And you kept right on cutting?

A. Yes.

Q. How close were you to him?

A. I was close enough to get blood all over myself; right against me.

Q. Was he trying to hold himself up?

A. Yes, he tried to hold himself up after he was cut.

Q. And you kept right on cutting?

A. Yes.

Q. Do you remember how many times you cut him?

A. No, I don't.

Q. Did you change hands with your knife?

A. No, I never.

Q. Did you ever get behind him?

A. I don't know if I did or not.

Q. How long before he dropped to the floor, if he ever dropped to the floor?

A. He dropped after I got away from him.

Q. In other words, you pulled away from him, and he dropped to the floor?

A. Yes."

3. Tom Kelly is approximately 5 feet 6 inches tall and weighs approximately 155 pounds.

4. Horace Bright was not only a strong man, but a fighting man, capable of taking care of himself in a fight.

5. Tom Kelly was not hit, cut, or in any way injured as a result of the assault on Horace Bright.

From the above evidence, it is clear that the jury was not only entitled to find beyond a reasonable doubt that the elements of deliberation and premeditation were present but were virtually compelled to find deliberation and premeditation. From the above evidence it is clear that had Horace Bright, a strong, fighting man been facing Tom Kelly with a knife in his hand, he would have inflicted some wounds upon Tom Kelly during the course of the struggle, if any struggle actually took place. If there had been any struggle between Tom Kelly and Horace Bright, the stab wounds would have certainly been in the nature of slices or slashes rather than puncture holes just large enough to admit the knife blade. From the evidence in this case, the jury was entitled to find and believe beyond a reasonable doubt that Horace Bright was either attacked from the rear or under

such conditions as would render him completely helpless. These physical facts show that this homicide could only have been committed by an assailant who had deliberately pre-planned his attack.

The second claim of error under Section II of the Argument as set out in the appellant's brief reads:

> "The trial Court made reversible error in failing to grant appellant's motion for direct verdict on the first degree homicide charge."

It is assumed that the appellant is referring to the motion made at the close of the Government's evidence which is set out on pages 105, 106, 107 and 108 of the Transcript of the Proceedings. In that motion, the only challenge which was made was as to the sufficiency of the evidence to prove the cause of Horace Bright's death. Counsel for the appellant argued at that time that the doctor who testified as to his examination of the body of Horace Bright did not testify conclusively that the victim died as a result of the stab wounds. The Court overruled this motion for the reason that the doctor had testified that in his opinion the stab wounds were the cause of Horace Bright's death and further Tom Kelly in his signed statements which were then in evidence stated, "I know that I killed him".

This was the only motion throughout the entire

trial which was made by counsel for the appellant. Even if counsel for appellant had made a motion such as claimed in the second assignment of error in Section II of the Argument, the same would properly have been denied in view of the evidence which had been adduced up until that time as heretofore discussed.

The appellant thereafter offered evidence, thus waiving the challenge to the sufficiency of the evidence at the close of the Government's case. The case of *Mosca v. United States* (9 C.A.) 174 F. (2d) 448, states in effect that where a defendant challenges the sufficiency of the evidence in the close of the Government's case and thereafter offers evidence in his own behalf he thereby waives such motion for purposes of appeal.

The third assignment of error as set out in Section II of the argument in appellant's brief reads:

> "The trial Court further erred in submitting the issue of first degree murder to the jury."

The Transcript of Proceedings fails to reveal that any motion whatsoever was made at the close of all of the evidence. Therefore, under the ruling in the case of *Mosca v. United States*, 174 F. (2d) 448, this court will not review such a motion for a judgment of acquittal made for the first time upon appeal.

However, if this court does choose to consider such a motion, the argument heretofore made in answer to appellant's first and second assignments of error under Section II of the Argument as set out in the brief is likewise an answer to the appellant's motion.

The fourth assignment of error set out in Section II of the appellant's argument is that the trial Court further erred "in not granting appellant a new trial on grounds Nos. III and IV of his motion alleging that the verdict was contrary to the weight of the evidence and was not supported by substantial evidence." The United States Supreme Court has repeatedly held that the overruling of a motion for a new trial is not assignable as error. In *Wheeler v. United States*, 159 U. S. 523, 40 Law. Ed. 244, the United States Supreme Court stated:

> "Another contention is that the Court erred in overruling the motion for a new trial, but such action, as has been repeatedly held, is not assignable as error. *Moore v. United States*, 150 U. S. 57; *Holder v. United States*, 150 U.S. 91; *Blitz vs. United States*, 153 U.S. 308."

The *Wheeler* case just quoted was an appeal from a murder conviction where the defendant had been sentenced to be hanged. For other cases with like holdings, see *Clune v. United States*, 159 U.S. 590, 40

Law. Ed. 269, and *Lueders v. United States* 210 Fed. 419 (9 C. A.).

III.

The assignment of error as set out in Section III of appellant's brief states: "The trial court erred in failing to grant appellant a new trial on the ground that he did not have a fair and impartial trial because * * *."

Again, it is pointed out that the denial of his motion for a new trial can not be reviewed as error by the Appellate Court (See *Wheeler vs. United States*,, Supra).

The first three errors assigned under Section III of the argument in appellant's brief pertain to claims of error in the instructions. As shown by the Transcript of Proceedings, after the close of all the evidence the Court had a discussion with counsel on both sides regarding the proposed instructions. At the close of that discussion the following proceedings took place:

MR. JOHNSON: "None, Your Honor. For the sake of the record, while I made my objection and took an exception to giving instructions on the self defense matter, I would like it noted that I have a specific objection to the Court's failure to give the

defendant's requested instructions Nos. 2, 3, 4 and 5."

THE COURT: "Well, Counsel, after both sides have argued, I will instruct the jury. After I have instructed the jury you will have the opportunity of excepting to the instructions I give, the opportunity of excepting to the refusal of the instructions you requested, that is, you will be given opportunity to except to my refusal to give them. And you are privileged to except now, but that will not foreclose you hereafter, and I may tell you that I don't think you can depend on your present exceptions. In order to have your exceptions really valid, you should repeat them." (Tr. 295, 296).

After the Court had instructed the jury the following proceedings took place:

THE COURT: "Very well. Any exceptions by the defense?"

MR. JOHNSON: "I would except to the instruction on turbulence, which I think was very excellent as far as it went, but I think it should have touched on the matter concerning the overt act of a man with a known dangerous reputation and that such reputation justifies quicker action on the part of the killer in defending himself. I think that should have been considered."

THE COURT: "All right. Any others?"

MR. JOHNSON: "Also on the instructions as to the right of one to act in defense of another. I felt they were very good as far as they went, but it seemed to me that they should have been a little clearer. I beg your pardon, that was corrected afterwards."

THE COURT: "Yes, I covered it."

MR. JOHNSON: "Yes."

It is plain that the appellant took no exceptions to the Court's instructions as is now assigned as error despite the Court's previous admonition to counsel for the appellant so to do.

Thereafter, on April 8, 1949, after counsel for the appellant had made an argument in support of his motion for a new trial, the following proceedings took place:

THE COURT: "In the cause of *United States vs. Thomas Kelly*, the Defendant, through his Counsel, has moved for a new trial. Counsel has advised the Court that he is depending upon grounds two and three of the motion. I would assume, although it has not been expressly stated, — I would assume from the argument that Counsel has no objections to the instructions given, but feels that the jury's verdict

under the evidence was in contradiction of the instructions. Am I right?"

MR. JOHNSON: "That is correct, Your Honor."

THE COURT: "While the Defendant has not stressed the first ground of the motion, that the Court erred in denying Defendant's motion for an acquittal made at the conclusion of the evidence, I assume that the Defendant still depends upon that ground, —

MR. JOHNSON: "Yes, Your Honor."

THE COURT: — "for such value as it may have."

MR. JOHNSON: "Yes, Your Honor."

THE COURT: "In other words, this motion is now presented to the Court primarily upon grounds two and three of the motion and also, secondarily, upon ground one of the motion. The fourth ground is not urged."

MR. JOHNSON: "No, Your Honor."

From the foregoing it is clear that counsel for the appellant is satisfied that the instructions as given were correct and the assignments of error as to the instructions contained in the appellant's brief are not made with sincerity.

The first error assigned under Section III of the argument in the appellant's brief reads as follows:

"Instructions defining the elements of the crime submitted to the jury are erroneous and lack statements that under the evidence should have been submitted to the jury."

The argument in the appellant's brief addressed to this assignment of error centers upon the following words used by the trial judge in defining murder in the first degree:

"The deliberate purpose to kill is sufficient to constitute deliberation, and premeditation and the actual killing may follow each other as successive impulses or successive thoughts of the mind."

The appellant's brief then goes on to quote from cases decided in jurisdictions other than the Ninth Circuit.

The trial judge in the case at hand is bound by the decisions of the Court of Appeals for the Ninth Circuit. The law in the Ninth Circuit on this subject is set out in the case of *Paddy vs. United States* reported in 143 F. (2d) 847 (Cert. denied, 324 U.S. 855), wherein the following instruction is quoted as being proper:

"By 'deliberate and premeditated' as used in the

> indictment is meant that the idea of killing must have been conclusive and intended before the act which produced death; namely, the shooting. * * *. The deliberate purpose to kill, and the act in execution thereof may follow each other as rapidly as successive impulses or thoughts of the mind; it is enough that the purpose and the intent to kill preceded the act. * * *."

The Court of Appeals for the Ninth Circuit then goes on to state:

> "Malice to be premeditated does not require the premeditation of the cloister."

The instruction in the Paddy case was quoted and approved by the Court of Appeals for the Ninth Circuit in the case of *Schokley vs. United States* reported in 166 Fed. (2d), 704 at page 716. The Schokley case was decided exactly a year and a day prior to the time the trial judge in the case at hand gave his instructions. (Cert. denied in the Schokley case, 334, U.S., 850).

The attention of the Court is invited to the actual words used in the instructions in the Paddy case as compared with the words as used by the trial judge in the case at hand. It will be found that the trial judge's instructions were virtually verbatim with those used in the Paddy case.

The trial judge in the case at hand, being bound by the decisions of the Court of Appeals for the

Ninth Circuit, gave the correct instructions on the subject of premeditation and deliberation. Cases decided in other districts are not binding upon the trial judge in the case at hand and are not helpful to the appellant.

The jury found the appellant guilty of murder in the first degree. Therefore, any discussion of any claim of error as to the instructions on voluntary manslaughter would serve no useful purpose. However, in this regard, it is pointed out that the appellant's brief fails to quote all of the trial judge's instructions on voluntary manslaughter. The instructions which followed those quoted on pages 64 and 65 of the appellant's brief are as follows:

> "Voluntary manslaughter requires an intent to kill, but the intent may be acquired as a result of a sudden quarrel or in the heat of passion and must be without deliberation."

The second assignment of error as set out under Section III of appellant's argument states:

> "The trial court's charge to the jury contain comments on the evidence highly prejudicial to the defendant."

It must be conceded that the trial judge has the right to comment upon the evidence. The only question upon the trial judge's right to comment upon the evidence is that it must be made clear to the jury that

they are the actual triers of the facts and that they are not bound by the comments made by the trial judge. This was done in the case at hand with more particularity than is required. On page 300 of the Transcript of Proceedings the trial judge stated to the jury:

> "I will say this now, and I will say it to you again. You are the jury. The responsibility is yours in determining the guilt or innocense of the defendant and as to the particular offense the defendant is guilty of if you find him guilty. You are not bound or controlled by what you think I think as to the guilt or innocence of the defendant. You are not bound or controlled by what I may believe as to the truth or lack of truth of the testimony of any witness. You are likewise not bound by what you think I think as to what witnesses should be believed or not believed. Such again are your responsibilities. If you have an idea a certain witness told the truth, you should accept the testimony of that witness regardless of whether you think I personally might think the witness was not worthy of belief. Follow your views and not mine."

Again, on page 326 of the Transcript of Proceedings the trial judge in instructing the jury stated:

> "Nothing in my instructions is intended to indicate what your verdict should be. Nothing in my instructions is intended to indicate that you should or should not return any particular verdict. The responsibility is yours, and you can only be honest good American citizens by returning the actually correct verdict regardless of the verdict you might like to return."

Again, on page 342 of the Transcript of Proceedings the Court in instructing the jury stated:

> "You are the sole and exclusive judges of the weight and credibility to be allowed the testimony of the several witnesses and each of them, both for the Government and for the defendant."

By the above quoted instructions the trial court clearly instructed the jury that they were not bound by the trial judge's comments on the evidence if any such comments were made.

The third assignment of error contained in paragraph III in the appellant's brief states:

> "The instructions contain arguments in favor of the prosecution and omit a fair statement of appellant's theory of the case."

The appellant in his brief complains that the trial judge did not single out the details favorable to the defendant and analyze the same for the jury. The trial judge is not required to make an argument to the jury for either side.

In the case of *Arwood vs. United States* (6 Cir.) reported in 134 Fed. (2d) 1007, the defendant was convicted of murder in the first degree. On page 1011 the Court states:

"In the argument the court's charge was criti-

cized. It was contended that the court did not analyze the evidence and apply the law thereto. This complaint is made here for the first time. There were no objections to the general charge or specific requests to summarize the evidence. Ordinarily the criticism would come too late, but this is a capital case and we consider it. See *Max Stephan v. United States*, 6 Cir., 133 F. (2d) 87, decided by us February 6, 1943. The particular contention is, that because it was possible under the indictment for the jury to have returned a verdict upon either of the degrees of offenses embraced thereunder, the court should have stated the evidence in detail and instructed the jury under what state of facts, if found by them, the appellant would have been guilty of either of these offenses.

"We do not think the charge susceptible to the criticism. The Court instructed the jury, 'You jurors are the sole judges of the evidence, also the judges of the law as applies to the facts in the case, but cannot disregard the law as given you by the court,' and pointed out with commendable clarity and in meticulous detail the elements which constitute the offenses of murder in the first degree, murder in the second degree, voluntary manslaughter, and even involuntary manslaughter, and followed all this with the statement 'I have given you the distinguishing characteristics of the four grades of felonious homicide embraced in this indictment.'

"The court then instructed the jury that if it found the appellant guilty beyond a reasonable doubt it was the duty of the jury to decide the grade of offense of which he was guilty. More than this was not required. We must assume that the jury were men of intelligence and sound

judgment and that they were able to comprehend the charge.

"In *Stilson v. United States*, 250 U.S. 583, 588, 40 S. Ct. 28, 30, 63 L.Ed. 1154, it was said: '3. It is contended that the court did not analyze and discuss the details of the evidence. The trial judge left matters of fact to the determination of the jury in a charge commendable for its fairness. Certainly the lack of discussion in detail does not amount to a valid objection; particularly in the absence of any specific request for comment upon any special phase of the testimony'."

The law as stated by the United States Supreme Court in the Stilson case, which is contained in the quote above from the Arwood case, is binding and controlling upon this court. The appellant cannot complain that the trial judge did not make an argument to the jury in the appellant's favor.

The fourth assignment of errors under Section III of the appellant's brief states: "Exhibit 18 should not have been admitted."

Exhibit 18 is attached hereto in the Appendix, the same being a signed statement made by the appellant's mother, Ivy George, on October 27, 1948. In Exhibit 18 the witness, Ivy George, stated, "He started toward me with the knife and tried to strike me with it." On cross examination Ivy George testified to the effect that she did not see a knife in Horace Bright's hand until after Horace Bright had

beat her with his fists, and further denied on cross examination that Horace Bright ever tried to strike her with a knife. These are certainly contradictory statements and the admission of Exhibit 18 could not have been error.

CONCLUSION

The appellant in this case complains that he did not have a fair trial. The Court's attention is invited to the summary of the entire trial given by the trial Judge at the conclusion of the appellant's argument for a new trial, starting on page 378 of the Transcript of Proceedings and concluding on page 390. As the trial Judge pointed out in that comment, both the Government and the trial Judge leaned over backwards to give the appellant a fair trial. The Court admits that several errors were made in favor of the appellant and concludes with this statement: "I think the jury tried to give this young Indian man a fair trial. I think the jury was unable to explain the wounds except on the basis that the defendant was guilty as charged. The jury has that right. I don't think the jury made a mistake."

In concluding, it is respectfully submitted that the trial Judge committed no errors in the conduct of the trial and that the defendant was properly and

fairly tried and convicted, and the Judgment of Conviction should be affirmed.

Respectfully submitted,

J. CHARLES DENNIS,
United States Attorney

VAUGHN E. EVANS
Assistant United States Attorney

HARRY SAGER
Assistant United States Attorney

Office and Post Office Address:
1017 United States Court House
Seattle 4, Washington

APPENDIX

EXHIBIT 1

"City-County Bldg.
Seattle, Wash.
10-27-48 1:17 PM

"I, Thomas Kelly also known as Thomas Bright make the following voluntary statement to John Carl Netter and James Dunphy who have identified themselves to me as Special Agents of the FBI. I have been told that I do not have to make this statement and that it can be used in a court of law against me. No threats, promises or duress have been used to obtain this statement. I have been advised of my right to have an attorney-at-law present.

"I, Thomas Kelly, am twenty three years old having been born June 10, 1924, at Oakville, Washington, and have a seventh grade education. On October 24th at about 9 PM my mother, Ivy George Bright, my father, Horace Bright, and a friend Charlie Sailto and myself went to Forks, Wn. and secured some liquor. We were driving in Charlie Sailto's car and he left after bringing us home.

"My mother, father and myself went into the house and continued to drink the liquor. Between midnight and one o'clock in the morning of the twenty-sixth of October my father began to get mean with my mother. I told him not to be mean to her. He got mad at me and went into his bedroom and got his hunting knife and was going to cut me with the knife. I grabbed my knife from the window sill and I stabbed him with my knife. I don't know where I stabbed him. After I stabbed him he dropped his knife. All this happened in the front room of Lavin Coe's house on the LaPush Indian Reservation, LaPush, Washington.

"I know that I killed him.

"I next dragged him to his bed and left him there. I never notified anyone.

"I have read this statement and it is true. I have initialed the first page and signed the second page.

/s/ "Thomas Kelly

"Witnesses: Oct. 27, 1948 2:00PM

/s/ John C. Netter, Special Agent FBI

/s/ Special Agent James Dunphy
FBI 2:01 PM 10/27/48 "

EXHIBIT 2

"10-28-48 10:12 AM
Sheriff's Office
City County Bldg.
Seattle, Wn.

"I, Thomas Kelly also known as Thomas Bright, make the following voluntary statement to James Dunphy and John C. Netter who have identified themselves to me as Special Agents of the FBI. No threats, promises, or duress have been used to induce me to make this statement and I have been told that I do not have to make this statement and, that if I do make this statement that it can be used against me in a court-of-law. I have been advised that I have a right to have counsel present.

"I am twenty-three years old and was born in Oakville, Washington, on June 10, 1924. I have completed about six and one half years of schooling. I went to school at Taholah, Washington, then I was sent to the Cushman Hospital at Tacoma, Washington where I continued my schooling and afterwards came

back to Taholah, Washington where I left school to go to work.

"I was sent to Cushman hospital for T.B. However, I don't cough much and feel good at this time.

"I live in Brownstown, Washington with wife's folks. There address is Harrah, Washington, Star Route, Box 145, care of Bill Sampson.

"I married Virginia Edwards September 22, 1943 in Yakima, Washington. We went through no ceremony but just started living together.

"The Sampson family that my wife and I live with are my wife's aunt and uncle. They have two sons living with them and a daughter who is living in Wapato, Washington.

"My mothers maiden name was Ivy Mary Waterman. My mother first married Lewis Kelly and had one child named Ruth. She next married Horace Bright. I was born when she was married to Horace Bright so Ruth is my Step sister. Next my mother married Edward George who died about 1942, after which my mother went back with Horace Bright.

"During the early part of the war I worked for Boeing Aircraft Company both at Tacoma and later at Seattle as a Riverters helper. Since that time I have been employed as a fisherman, picking hopps, in the hopp yards and in the bag fields.

"I left Wiley, Washington, Sunday afternoon October 17, 1948 to go to Yakima, Washington. I was picking apples for a person named Snelling in Wiley, Washington.

"At about 6 PM, Sunday, October 17, 1948 I left Yakima, Washington, by buss for Seattle, Washington. I arrived in Seattle, Washington about 11:30 P.M. Sunday night. As there were no ferries running I took in a show near Yessler Way. I saw a

picture where a man thought his brother had turned into a dog. I can't remember the name of the picture. The other picture was named the "Mating of Millie." After I got out of the movie I caught the ferry to Bremerton, Washington. I did not catch the ferry immediately after leaving the movie as I walked to the buss station to get my suitcase which was checked there. I arrived in Bremerton about 8 o'clock in the morning and caught a buss to Skokomish, Washington.

"My mother has a house at Skokomish Washington on the reservation. I was supposed to meet my mother and father there. However, after I got to my mother's house, I found that my father had left about a week before to go up to Lavin Coe's place at LaPush, Washington, to do some fishing. I stayed at my mother's place that night and the next afternoon my mother and I left to join my father. We took the buss from Skokomish, Washington, to Port Angeles. At Port Angeles, Washington, there were no busses running so my mother and I stayed in the Merchants Hotel. This was Tuesday night October 19, 1948 as near as I can figure around 5:30 PM. Left Port Angeles, Washington about 2:30 in the afternoon by buss for Forks, Washington. We arrived in Forks, Washington, about 5:30 or 6 in the evening and we met a friend named Tyler Hobucken and his wife going to a show. My mother and I went to the show with Tyler and his wife and when the show was over Tyler Hobucken took us all home in his car to LaPush, Washington.

"The next day we went fishing in the river. I mean my father and I went fishing. My father and I continued to fish every day thereafter.

"On Monday I fished all day alone. My mother and father went into Forks, Washington, that day.

"I came home after I got done fishing about 5

o'clock and my mother and father got home about the same time. They brought home a bottle of whiskey. I don't know whether it was a quart or a pint. The folks did not appear to have been drinking when they came home.

"Around 6:o'clock my father and I went down to the river to clean the net out. We stayed down there about an hour and then came back to the house.

"I next worked on my dip net and then had some pineapple for supper.

"Going back just a bit, I remember that my mother, father and myself drank about half the bottle they brought back from town before we went down to clean out the net.

"My father then wanted to go back to Forks, Washington to get some more liquor. The three of us walked over to Charlie Sailto's, which is about three blocks, and asked him to take us to town. Charlie agreed to take us to Forks. My father talked to Charlie and I don't know what was said.

"My father and I were not fighting when we were down at the net. I always got along good with my father and mother. My mother and father were getting along all right before they went to town. I have never seen my father stricke my mother. They have had arguments before.

"Charlie Sailto and his wife sat in the front seat of the car. I believe the car was a 1936 Buick. Facing Foward I sat in the right hand side of the car, my mother sat in the middle and my father sat in the left hand side. Like it is in the picture.

(DIAGRAM)

"We finished the bottle on the way to Charlie Sailto's house and threw the bottle in Charlie Howeattle's yard.

"There were no arguments in the car on the drive into Forks.

"We parked the car on a street in Forks and my father got out to go look for a bottle. Everyone else waited in the car. I got out and went over to a tavern to try to get some beer. I had about twenty-five dollars on me at the time. A fellow I met in the tavern who was talking to me about fishing came outside when I did. I asked him to get a gallon of wine for me and gave him $6.00. He went into the tavern and came out with the wine and gave me some change. There was not much change. I don't know what type of wine it was. This took place in front of the tavern. This fellow asked me if I had any salmon with me. My father came along about this time and told him that there was two salmon at the house for him if he would come for them. My father asked him to go in and get two cases of beer. This stranger made two trips into the tavern and brought out one case of beer each time. My father paid him and I do not know how much money.

"It was dark out when this was going on I would say about 10:30 P. M. This tavern is located right across from the Post Office and next to the taxi stand. The car was parked a block over from the tavern in the opposite direction from the post office. I think it would be a block east of the tavern which is located on the main street in town. They moved the car here after I got out of it as it was parked south of the Post Office.

"We put the beer and wine in the car and drove back to LaPush. On the way back to LaPush everyone in the car had about three to four bottles of beer to drink.

"On the way back I sat in the front seat aside of Charlie Sailto's wife. My father sat on the right hand side comming back.

"Charlie dropped the three of us off at Lavin Coe's house where we were staying. Lavin Coe owned the house where we were staying. He lives at Queets, Washington. Coe is Bright's uncle, I believe.

"It was some where around midnight when we arrived home. Charlie Sailto did not come in.

"My mother, father and myself went into the house and drank some beer. Also, we were passing the wine jug around. I sat on a chair to the right of the front door fixing my small dip net. I was putting a new net on the frame. My mother and father were sitting to the left of the front door at a table.

"We continued drinking until about half the gallon of wine was gone and about half a case beer left.

"My father begain swearing at my mother. I do not know what he was mad about. He was getting mean to her. I heard him call her a 'Son of a Bitch'. I got up from the chair to get a bottle of beer and told my father not to be like that. My father told me not to butt in as I was walking over to where my net was.

"My father must have got up as I was returning to my chair. I did not notice him. After I had drank about inch and a half to two inches of beer out of the bottle.

"I next heard my mother scream and noticed my dad about ten feet from me. My father had a knife in his hand. My mother was then standing in the opposite side of the room from the table near a window.

"I jumped up and grabbed my knife from the window sill. The knife was laying on the window sill next to the chair on which I was sitting. This is not the window next to the door.

"See diagram 1-A

"I don't know what position my father had the

knife. I saw the knife in his hand.

"I had had a lot to drink but was not too drunk. My father did not seem too drunk.

"When I seen him with his knife I jumped at him with my knife.

"I know that I cut him. He droped his knife. I don't know where I hit him with my knife.

"I do not know what happened after that. I do not know what my mother did.

"I seen he was dying.

"My mother and I dragged him over to the bed. We both lifted him onto the bed.

"When my father was comming at me I thought that he was going to cut me.

"My mother listened for his heart and said he was dead just after we put my father in bed.

"My mother did not know what to do. I told her to go to Yakima and bring my wife back to Seattle or Tacoma. I told her I was going to give myself up in Seattle or Tacoma.

"I told her to phone up a taxi in LaPush to take her to Forks.

"I gave her about twenty dollars and she left about two dollars in change on the stove for me.

"She left right then.

"I next went over by the stove and went to sleep. The stove is opposite the front door.

"The fight took place about 12 midnight to one o'clock in the morning of the twenty sixth of October.

"I woke up the next morning. I did not know what time it was. I found my knife on the floor near

the stove. My knife is about ten inches long and has a brown leather handle. I use this knife salmon fishing and to repair nets. I did not touch my fathers knife.

"After I woke up I put my knife in my belt and took about twelve or thirteen bottles of beer and about one half a gallon of wine to Harvey James' house. He was still in bed. I was going to ask him for a couple of dollars but he did not have any money. I told him nothing about what had happened.

"I next went to the Post Office and called a taxi at Forks, Washington. It was then about nine o'clock. The taxi took about thirty minutes to get to where I was waiting at the Post Office at LaPush. I took the taxi and got off about a mile outside of Forks at the highway. I walked about three miles before I caught a ride to Port Angeles. The taxi cost four dollars. I started out with five or six dollars. I had change in my pocket beside the change my mother left for me.

"When I got to Port Angeles, I went to the ferry and asked them how much it cost. They wanted two or three dollars and I did not have enough money.

"I went and sold my watch and knife for one dollar. I sold my watch and knife for one dollar to a second hand store about a block from the ferry dock. The watch was a pocket watch made by Ingram.

"I went back down to the dock and got a ticket. Then I waited a few minutes for the boat. The time was about 12 noon or one o'clock. The boat reached Seattle about 6 o'clock at night.

"I came off the boat and walked to Yessler and then around the block. When I was walking around the block I met Charles Howeattle. He was going

to eat and I went in with him. I ordered pie and only ate half of it but, could not hold it down.

"Charles took me up to a hotel and bought me a room.

"This Charles Howeattle is my fathers uncle.

"I did not tell him what happened.

"I stayed in what I believe was the Traverlers Hotel room 36 or 37. I stayed there all night.

."I got up the next morning at seven o'clock and waited until eight or nine o'clock for Charles Howeattle to get up. He was at the same hotel but not the same room.

"I left the hotel and came down to the Sheriff's Office in Seattle and gave myself up.

"What I have told in this statement is true and I am not covering up for someone else.

"I have read this 14 page statement and drawn a diagram and have signed the last page. I have each other page initialed and have initialed all mistakes. This statement is true to the best of my knowledge.

/s/ "Thomas Kelly

"Thomas Bright

Special Agent James Dunphy FBI 10-28-48 5:27 PM

Special Agent John C. Netter FBI 10-28-49 5:27 PM"

EXHIBIT 18

"Wapato, Wash.
Oct. 27, 1948

"I, Ivy George, make the following voluntary statement to A. O. Richards and Eugene P. Clark,

whom I know to be Special Agents of the Federal Bureau of Investigation. No threats or promises have been made to induce me to make any statement and I have been advised this statement may be used in court. I have been advised of my right to consult an attorney before making any statement.

"I have been living with Horace Bright, a member of the Quillayute Indian Tribe, at Lapush, Washington for about four years as his common law wife.

"On October 25, 1948, Horace Bright, Thomas Kelly, my son and Bright's went to Forks, Washington and each of the men bought a case of beer and one also bought a gallon of wine. All three of us had previously been drinking some whiskey and wine purchased earlier in the day by Bright. We returned to Lapush to Bright's home and I started to build a fire and Thomas Kelly started repairing a net in the front room. I first noticed signs of trouble when I heard Bright speaking in a loud tone to Thomas and saw him jerk the net out of Thomas' hands. Bright then threw the net on the floor, and I noticed he had an all metal knife in his hand which is his and which he generally carries in a sheath. He started toward me with the knife and tried to strike me with it. I dodged him for a moment, then when he was still trying to stab me with the knife Thomas Kelly came up behind him and stabbed him in the back with a hunting knife he had been using to repair the net. Bright fell to the floor and Thomas and I dragged him to the bed in the front room and laid him on the bed. Before we moved him, he said to Thomas 'You've got me, son.' He died almost immediately after that. Thomas then asked me to notify his wife Virginia Edwards near Brownstown. I left the house about half an hour later which would be very soon after midnight, leaving Thomas Kelly and the body of Bright there.

"I have read this statement of two pages and it is true.

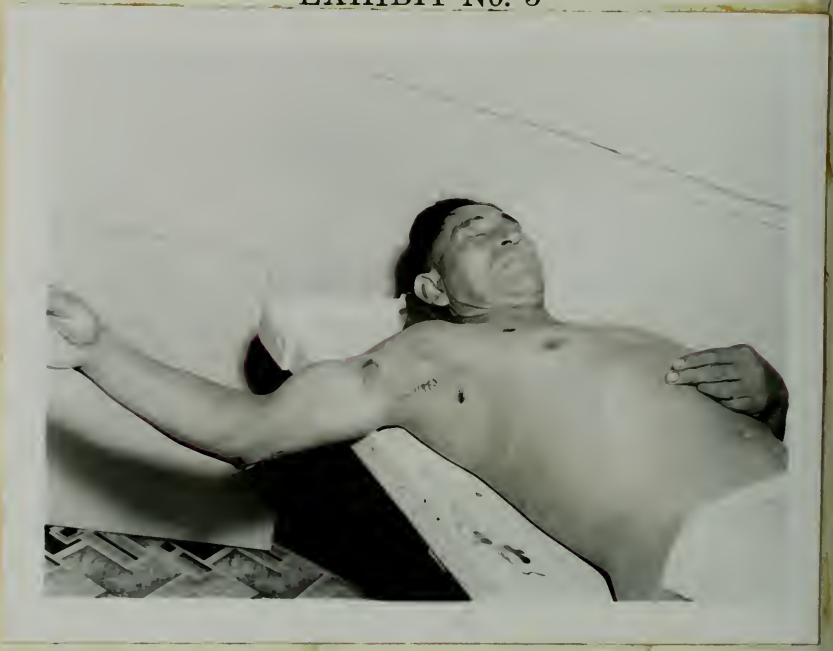
"Ivy George /s/

"Witnesses:

"Eugene P. Clark, /s/, Special Agent F. B. I.

"Amedee O. Richards, Jr., /s/ Special Agent F. B. I.

EXHIBIT No. 3



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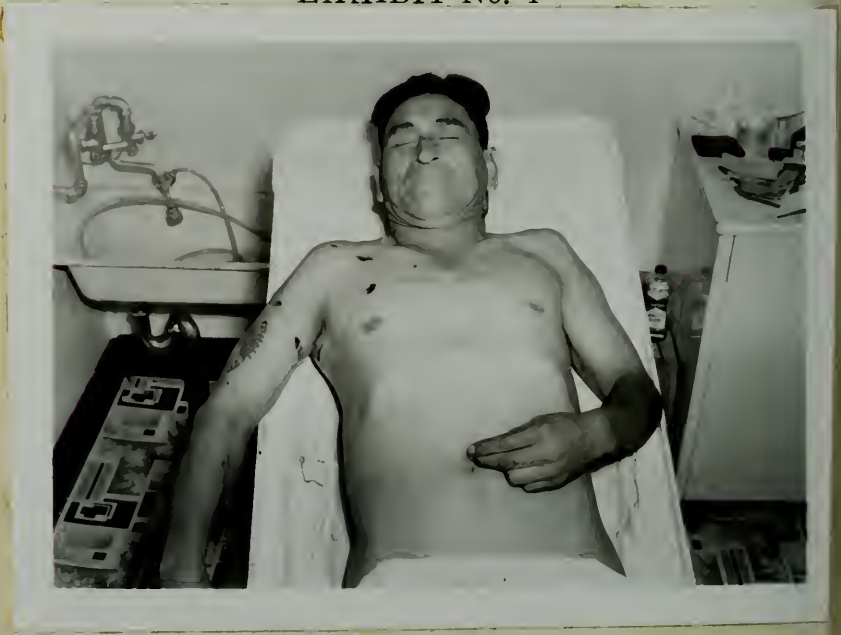

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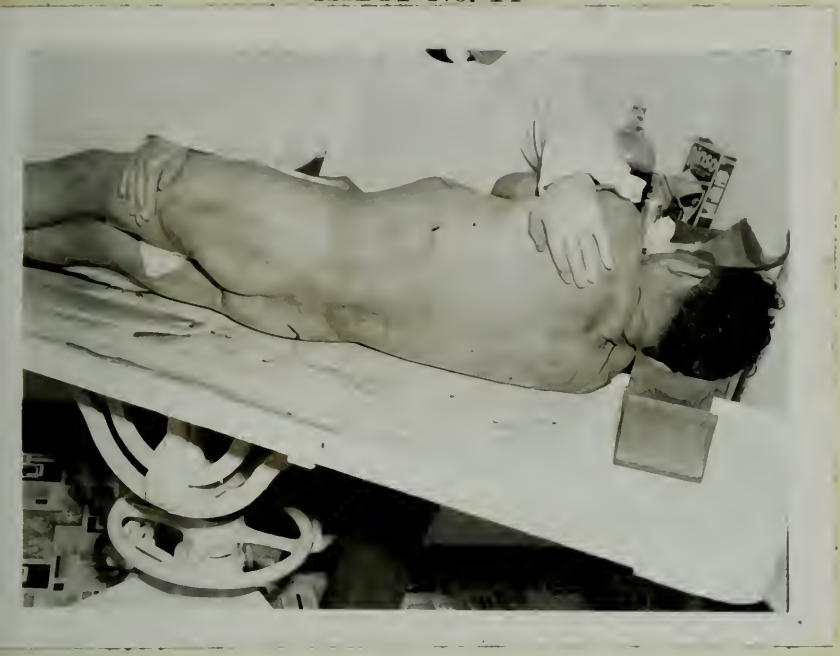

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